

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----X
UNITED STATES OF AMERICA

: 06 Crim. 442 (LAP)

v.

: MEMORANDUM AND ORDER

SYED HASHMI,

:

Defendant.

:

-----X

Loretta A. Preska, Chief U.S.D.J.:

Defendant Syed Hashmi ("Hashmi") is charged in a four-count superseding indictment (the "Indictment") with, inter alia, providing "material support or resources" to a designated foreign terrorist organization ("FTO"), namely, al Qaeda, in violation of 18 U.S.C. § 2339B ("§ 2339B"), and contributing "funds, goods, or services" thereto in violation of the International Emergency Economic Powers Act, 50 U.S.C. § 1705(b) (the "IEEPA"). Hashmi moved to dismiss the Indictment on constitutional grounds and for failure to state an offense (dkt. no. 62). He also moved separately for a bill of particulars (dkt. no. 65). On February 17, 2009, the Court heard oral argument and denied both motions. The rationale for that ruling is set forth below.

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BACKGROUND

Hashmi's motion to dismiss turns in part on the legal sufficiency of the Indictment. In determining whether an indictment is legally sufficient, the Court takes all pertinent allegations as true. Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 343 n.16, (1952); see also United States v. Velastegui, 199 F.3d 590, 592 n.2 (2d Cir. 1999). A summary of those allegations follows.

Count One of the Indictment charges Hashmi with conspiracy to provide material support to an FTO in violation of 18 U.S.C. § 2339B; Count Two charges him with providing and attempting to provide such support. These Counts allege that between January 2004 and May 2006, Hashmi, somewhere outside the United States and in league with unnamed others, conspired to provide and actually did provide al Qaeda, an FTO, with "property, tangible and intangible, and service, including currency and other physical assets," among which was "military gear." Hashmi's co-conspirators then transported the military gear to South Waziristan, Pakistan, for al Qaeda's use in fighting United States troops in Afghanistan. Counts One and Two further allege that Hashmi knew al Qaeda was a

designated terrorist organization and that it had engaged and was engaging in terrorist activity. (Ind.¹ ¶¶ 1-3.)²

¹ "Ind." refers to the Indictment filed by the Government on Jan. 29, 2009.

² Count One charges a conspiracy to violate § 2339B as follows:

From at least in or about January 2004, up to and including in or about May 2006, in an offense begun out of the jurisdiction of any particular State or district of the United States, SYED HASHMI, a/k/a "Fahad," the defendant, and others known and unknown, at least one of whom was first brought to and arrested in the Southern District of New York, unlawfully and knowingly did combine, conspire, confederate, and agree together and with each other to provide "material support or resources," as that term is defined in Title 18, United States Code, Section 2339A(b)(1), namely, property, tangible and intangible, and service, including currency and other physical assets, to a foreign terrorist organization, to wit, al Qaeda, which was designated by the Secretary of State as a foreign terrorist organization on October 8, 1999, pursuant to Section 219 of the Immigration and Nationality Act, and has remained so designated through and including the present time, in violation of Title 18, United States Code, Section 2339B.

It was a part and an object of the conspiracy that SYED HASHMI, a/k/a "Fahad," the defendant, a United States citizen, agreed with others to assist al Qaeda by providing military gear to co-conspirators not named as defendants herein who transported the gear to al Qaeda associates in South Waziristan, Pakistan, knowing that al Qaeda was a designated terrorist organization (as defined in Title 18, United States Code, Section 2339B(g)(6)), that al Qaeda had engaged and was engaging in terrorist activity (as defined in Section 212(a)(3)(B) of the Immigration and Nationality Act), and that

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al Qaeda had engaged and was engaging in terrorism (as defined in Section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989), in violation of Title 18, United States Code, Section 2339B.

(Title 18, United States Code, Sections 2339B and 3238.)

(Ind. ¶¶ 1-2.)

Count Two charges a substantive violation of § 2339B as follows:

From at least in or about January 2004, up to and including on or about May 2006, in an offense begun out of the jurisdiction of any particular State or district of the United States, SYED HASHMI, a/k/a "Fahad," the defendant, and others known and unknown, at least one of whom was first brought to and arrested in the Southern District of New York, unlawfully and knowingly did provide and attempt to provide "material support or resources," as that term is defined in Title 18, United States Code, Section 2339A(b)(1), namely, property, tangible and intangible, and service, including currency and other physical assets, to a foreign terrorist organization, to wit, al Qaeda, which was designated by the Secretary of State as a foreign terrorist organization on October 8, 1999, pursuant to Section 219 of the Immigration and Nationality Act, and has remained so designated through and including the present time, in that SYED HASHMI, a/k/a "Fahad," a United States citizen, provided military gear to others not named as defendants herein who transported it to al Qaeda associates in South Waziristan, Pakistan, knowing that al Qaeda was a designated terrorist organization (as defined in Title 18, United States Code, Section 2339B(g)(6)), that al Qaeda had engaged and was engaging in terrorist activity (as defined in Section 212(a)(3)(B) of the Immigration and Nationality Act), and that al Qaeda had engaged and was engaging in terrorism (as defined in Section 140(d)(2) of the Foreign Relations

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Counts Three and Four charge Hashmi with, respectively, conspiracy to violate and substantive violation of the IEEPA in that, by providing al Qaeda with military gear to be used against United States forces in Afghanistan, he knowingly violated a regulation issued under the IEEPA that prohibits "making or receiving a 'contribution of funds, goods, and services to, and for the benefit of' a designated terrorist organization."

(Ind. ¶¶ 4, 5.)³

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Authorization Act, Fiscal Years 1988 and 1989).

(Title 18, United States Code, Sections 2339B, 2 and 3238.)

(Ind. ¶ 3.)

³ Count Three charges conspiracy to violate the IEEPA as follows:

From at least in or about January 2004, up to and including on or about May 2006, in an offense begun out of the jurisdiction of any particular State or district of the United States, SYED HASHMI, a/k/a "Fahad," the defendant, a United States person, unlawfully, willfully, and knowingly violated a regulation issued under Chapter 35 of Title 50, United States Code, to wit, SYED HASHMI, a/k/a "Fahad," the defendant, along with others known and unknown, did combine, conspire, confederate, and agree together and with each other to make and receive a contribution of funds, goods, and services to, and for the benefit of, al Qaeda, a specially designated terrorist organization, by agreeing with others to provide military gear to al Qaeda to be used by al Qaeda to fight against

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Hashmi argues that all four Counts fail to state a cognizable offense. He further argues that the § 2339B charges are unconstitutional violations of due process, his right of free speech and association, and the ex post facto clause. Finally, he argues that the IEEPA is an unconstitutional delegation of Congressional authority and incurably vague.

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United States forces in Afghanistan.
(Title 50, United States Code, Section 1705(b); Title 31, Code of Federal Regulations, Sections 595.204 & 595.205.)
(Ind. ¶ 4.)

Count Four charges a substantive violation of the IEEPA as follows:

From at least in or about January 2004, up to and including on or about May 2006, in an offense begun out of the jurisdiction of any particular State or district of the United States, SYED HASHMI, a/k/a "Fahad," the defendant, a United States person, unlawfully, willfully, and knowingly violated a regulation issued under Chapter 35 of Title 50, United States Code, to wit, HASHMI, along with others known and unknown, attempted to and did provide military gear to al Qaeda to be used by al Qaeda to fight against United States forces in Afghanistan.

(Title 50, United States Code, Section 1705(b); Title 31, Code of Federal Regulations, Sections 595.204 & 595.205; and Title 18, United States Code, Section 2.)

(Ind. ¶ 5.)

ANALYSIS**I. MOTION TO DISMISS****A. Statutory Framework****1. § 2339B**

In April 1996, Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA") and established § 2339B. Pub. L. No. 104-132, 110 Stat. 1214. As currently codified, § 2339B provides:

Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any terms of years or for life.

§ 2339B(a)(1). The term "material support or resources" is defined as

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b).⁴ In December 2004, Congress enacted the Intelligence Reform and Terrorism Prevention Act

⁴ Section 2339A ("§ 2339A") is an antiterrorism law enacted by Congress in 1994 as part of the Violent Crime Control and Law Enforcement Act. Pub. L. No. 103-322, Title XII, § 120005(a), 108 Stat. 1796, 2022 (codified as amended at 18 U.S.C. § 2339A(a)).

("IRTPA"). Pub. L. No. 108-458, 118 Stat. 3638. The IRTPA amended § 2339B in two ways that bear on Hashmi's motion. First, the term "material support or resources" was provided in its present form, stated above. Second, the IRTPA added a mens rea requirement to § 2339B. To violate the amended statute, a person providing "material support or resources" to an FTO must know that (1) "the organization is a designated terrorist organization," (2) "the organization has engaged or engages in terrorist activity," or that (3) "the organization has engaged or engages in terrorism." 18 U.S.C. § 2339B(a)(1).

2. IEEPA

Congress enacted the IEEPA in December 1977. Pub. L. No. 95-223, 91 Stat. 1626 (codified at 50 U.S.C. § 1701 et seq.). The IEEPA confers on the President certain powers "exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1701(a). In January 1995, President Clinton, pursuant to this authority, issued Executive Order 12947, which declared a national emergency with respect to "grave acts of violence committed by

foreign terrorists that disrupt the Middle East peace process." Exec. Order No. 12,947, 60 Fed. Reg. 5,079 (1995). The order prohibited "any transaction or dealing by United States persons . . . in property of [specially designated terrorists] . . . , including the making or receiving of any contribution of funds, goods, or services to or for the benefit of such persons." Id., 60 Fed. Reg. 5079. In August 1998, President Clinton added Osama bin Laden and al Qaeda to the list of "specially designated terrorists." Exec. Order 13099, 63 Fed. Reg. 45167 (1998). As amended in September 1996, Section 206 of the IEEPA provided for the following penalties:

(a) A civil penalty of not to exceed \$10,000 may be imposed on any person who violates, or attempts to violate, any license, order, or regulation issued under this title.

(b) Whoever willfully violates, or willfully attempts to violate, any license, order, or regulation issued under this title shall, upon conviction, be fined not more than \$50,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

Pub. L. No. 104-201, 110 Stat. 2422. Subsection (b) was amended in March 2006 to provide for a maximum penalty of twenty years. 109 Pub. L. No. 177, 120 Stat. 243.

B. All Four Counts State an Offense

Hashmi first contends that all four counts of the Indictment should be dismissed for failure to allege essential elements of an offense under either § 2339B or the IEEPA. (See Hashmi Mem.⁵ at 7-14.) Specifically, he claims that the § 2339B counts fail to state with particularity the "material support or resources" he allegedly provided to al Qaeda, while the IEEPA counts similarly fail with regard to the "funds, goods, and services" he is accused of providing.⁶

The Fifth Amendment guarantees that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" U.S. Const. amend V. The Sixth Amendment guarantees a defendant's right "to be informed of the nature and cause of the accusation" against him. U.S. Const. amend VI. Rule 7 of the Federal Rules of Criminal

⁵ "Hashmi Mem." refers to the Memorandum of Law in Support of Defendant's Motion to Dismiss the Indictment, filed January 30, 2009.

⁶ When he filed the instant motion, Hashmi also contended that the original indictment failed to state an offense because it did not allege that Hashmi knew al Qaeda was specifically designated as an FTO. The Government subsequently filed the currently operative Indictment, which, as Hashmi concedes, adequately alleges his knowledge in this regard. (Reply Memorandum of Law in Support of Defendant's Motion to Dismiss the Indictment, filed February 11, 2009, at 3.)

Procedure puts this notice requirement into effect by instructing that an indictment "be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c). For an indictment to fulfill these two functions—assuring that the defendant is tried only on matters that were considered by the grand jury and sufficiently notifying the defendant of the charges against him—the indictment "must state some fact specific enough to describe a particular criminal act, rather than a type of crime." United States v. Pirro, 212 F.3d 86, 93 (2d Cir. 2000) (internal quotations and citations omitted). Courts have "consistently upheld indictments that do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." Id. at 92.

The Indictment satisfies these standards. It charges Hashmi with knowingly providing material support or resources to al Qaeda; it identifies the form of material support as "currency" and "military gear"; it specifies the period in which the offense allegedly occurred; it names a destination for that support, namely, South Waziristan; and it alleges that Hashmi knew this conduct was unlawful. Hashmi's attempt to analogize the Indictment to the one

dismissed in United States v. Awan, 459 F. Supp. 2d 167 (E.D.N.Y. 2006), is not convincing. In Awan, the indictment alleged that the defendant had provided "material support and resources" to be used in a conspiracy to kidnap and/or maim persons outside the United States, in violation of 18 U.S.C. § 2339A, but referred only to the statute's broad definition of this term. Id. at 173 (citing indictment accusing defendant of providing and conspiring to provide "to provide material support and resources, as that term is defined in 18 U.S.C. § 2339A(b) (2005)"). The Government specified in its motion papers, rather than in the indictment, that it intended to prove specifically that the defendant provided money and personnel in furtherance of the conspiracy. Id. at 175. Because the indictment referred only to the broad statutory definition of "material support and resources," the Awan court was left unsure whether the grand jury had considered those particular categories of support. Id. Thus, Hashmi argues, Awan dictates that to accuse a defendant merely of providing "material support or resources" does not provide adequate notice; an indictment must specify the type of material support or resources.

The Indictment here goes beyond simply tracking statutory language and provides the sort of particularity

Hashmi argues that Awan requires. Specific types of material support or resources that Hashmi allegedly provided—currency and military gear—are explicitly stated in the Indictment and thus were presented to the grand jury. Both currency and military gear fall within the statutory definition of “material support or resources,” namely, “any property, tangible or intangible.” 18 U.S.C. § 2339A(b). “Currency” is specifically listed in the statute. Military gear is clearly a type of tangible property. I further note that when the Awan indictment was superseded by one that identified distinct categories of support, like those already provided in the Indictment at issue here, it was held sufficient. United States v. Awan, No. 06 Crim. 0154, 2006 U.S. Dist. LEXIS 81289 at *8-*10 (E.D.N.Y. Nov. 6, 2006) (citing indictment accusing defendant of providing and conspiring to provide “material support and resources, to wit: currency, monetary instruments, financial services and personnel”).

Moreover, in addition to providing language that goes beyond the statute in the elements of the charge, the Indictment provides a fairly narrow date range of approximately two and a half years in which Hashmi’s conduct allegedly occurred. This date range, along with the particular items described in the Indictment, provide

ample notice as to what acts are at issue. Hashmi is able to prepare a defense based on the information provided in the Indictment.

Hashmi also argues that the conspiracy counts fail to state a claim because they do not identify Hashmi's alleged co-conspirators. But there is "no requirement that the Indictment name co-conspirators, and courts in this district have repeatedly denied bills of particulars requesting such information." United States v. Ghannam, No. 04 Cr. 1177 (DAB), 2005 U.S. Dist. LEXIS 5385, at *3 (S.D.N.Y. Mar. 29, 2005) (collecting cases). As stated above, the Court finds that the Indictment is sufficient to apprise Hashmi of the charges against him. The Government need not provide further detail at this stage.

Accordingly, the Court finds that the Indictment properly states an offense.

C. The § 2339B Counts Are Constitutional

Hashmi next contends that the § 2339B counts should be dismissed as unconstitutional under the First and Fifth Amendments. (Hashmi Mem. at 14-30.) He argues that unless the Court finds that § 2339B incorporates a requirement of specific intent to further al Qaeda's aims, it violates the Fifth Amendment's Due Process clause by imposing liability without personal guilt. He further asserts that, without a

specific intent requirement, § 2339B violates the First Amendment, first, by infringing his right of association and, second, for vagueness and overbreadth. Hashmi also argues that prosecution under the amended § 2339B violates the Constitution's ex post facto clause.

1. Due Process

Hashmi contends that § 2339B violates his due process rights. He argues that the Government must show not only that he provided material aid to al Qaeda, but that in doing so he specifically intended that his assistance would further al Qaeda's pursuits. Absent such a specific intent requirement, he argues, the statute criminalizes innocent conduct and imputes guilt through association in violation of the Fifth Amendment. (Hashmi Mem. at 14-18.)

An individual's mere association with a group that has both legal and illegal aims cannot serve to establish criminal liability. See Scales v. United States, 367 U.S. 203, 229 (1961) (A "blanket prohibition of association with a group having both legal and illegal aims . . . [would pose] a real danger that legitimate political expression or association would be impaired."). "Personal guilt," i.e., "concrete personal involvement in criminal conduct," id. at 220, must always exist, and therefore a statute that prohibits association with a group having both legal and

illegal aims must require proof that the defendant specifically intended to further the group's illegal aims.

Section 2339B does not run afoul of these precepts. It criminalizes conduct, namely the provision of material support to a known FTO, rather than mere association with such a group. Accordingly, the "personal guilt" standard upon which Hashmi relies, articulated in Scales, is satisfied.

Scales involved a statute that criminalized association with a group that espoused illegal behavior, and its analysis of "personal guilt" is only relevant when the "government seeks to impose liability on the basis of association alone . . . or because a person espouses the views of an organization that engages in illegal activities. Conduct giving rise to liability under section 2339B, of course, does not implicate associational or speech rights." Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1026 (7th Cir. 2002) (internal citations omitted). Section 2339B criminalizes the conduct of intentionally providing support to a group known by the defendant to be unlawful—what the Scales court referred to as "concrete personal involvement in criminal conduct." Scales, 367 U.S. at 220. Rather than penalizing mere association with a group with illegal aims, the statute criminalizes a

"relationship . . . sufficiently substantial to satisfy the concept of personal guilt." *Id.* at 225.

It is thus no surprise that every court save one to have addressed Hashmi's "personal guilt" argument has rejected it.⁷ Indeed, as this Court explained in United States v. Sabir, No. 05 Crim. 673, 2007 U.S. Dist. LEXIS 34372 at *32-*33 (S.D.N.Y. May 9, 2007), § 2339B plainly excludes any requirement of specific intent to further the activity of an FTO. In enacting § 2339B, Congress intended to prohibit the provision of support to FTOs on the "fullest possible basis, consistent with the Constitution."

⁷ See, e.g., United States v. Warsame, 537 F. Supp. 2d 1005, 1021 (D. Minn. 2008) ("§ 2339B requires that the prosecution show a [defendant's] 'concrete, personal involvement in criminal conduct,' rather than his mere association with it.") (citations omitted); United States v. Uzair Paracha, No. 03 Cr. 1197, 2006 U.S. Dist. LEXIS 1 at *87 (S.D.N.Y. Jan. 3, 2006) ("This Court agrees that the statute's focus on conduct rather than association or membership . . . is sufficient to satisfy the due process requirement of personal guilt."); United States v. Al Kassar, 582 F. Supp. 2d 488, 498 (S.D.N.Y. 2008) ("[B]ecause Section 2339B does not criminalize guilt by association, Scales and its 'personal guilt' standard are not implicated."). The outlier is United States v. Al-Arian, 329 F. Supp. 2d 1294 (M.D. Fla. 2004), which held § 2339B unconstitutional without a specific intent requirement. But that decision was delivered before the IRTPA added the scienter requirement. Therefore, al-Arian's analysis is no longer applicable: Congress's amendment has superseded (and implicitly rejected) the al-Arian court's construction. See, e.g., United States v. Ihsan Elashyi, 554 F.3d 480, 505 (5th Cir. 2008) (holding that al-Arian's inference of a specific intent requirement would "effectively rewrite the statute").

AEDPA, Pub. L. No. 104-132, § 301(b), 110 Stat. 1274 (1994). To this end Congress provided the following mens rea requirement in its December 2004 amendment: "To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism." 18 U.S.C. § 2339B(a)(1).

The statute does not require that, in providing material support to an FTO, a contributor must specifically intend to further its goals. Nor is it constitutionally required to do so. It is enough that Hashmi is alleged to have provided material resources to a group that he knew was designated as an FTO or that he knew had engaged in terrorism. See United States v. Aref, 2007 U.S. Dist. LEXIS 12228, at *77 (N.D.N.Y. Feb. 22, 2007) (rejecting defendant's post-trial motions for a judgment of acquittal or a new trial and stating: "whether [defendant] agreed with the goals of the [FTOs] is not the issue, but instead whether he knowingly and intentionally provided material support or resources to a group he knew was a foreign terrorist organization"), aff'd, 285 Fed. Appx. 784 (2d Cir. 2008). Here, Hashmi is not charged simply with associating with an FTO or even expressing explicit support

for its goals. He is charged with knowingly providing an FTO with currency and military gear. These allegations are sufficient to satisfy the Fifth Amendment's due process requirements. See Uzair Paracha, 2006 U.S. Dist. LEXIS 1, at *95 (requiring that jury be instructed on scienter requirement to satisfy due process).

2. Vagueness Challenge

Hashmi next argues that § 2339B's definition of "material support or resources" is unconstitutionally vague. (Hashmi Mem. at 24-28.) The "void for vagueness" doctrine, grounded in the Due Process Clause, "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citations omitted). A statute may be vague either as applied to the conduct at issue or on its face. Hashmi contends that § 2339B is vague in both respects. In such cases, the as-applied challenges should be considered first. "Because the permissibility of a facial challenge sometimes depends upon whether the challenged regulation was constitutional as applied to the plaintiff, '[a] court should . . . examine the complainant's conduct before analyzing other

hypothetical applications of the law.''" Farrell v. Burke, 449 F.3d 470, 485 (2d Cir. 2006) (citing Village of Hoffman Estates v. Flipside, 455 U.S. 489, 495 (1982)). I therefore first consider Hashmi's as-applied challenge.

a. As Applied

To decide as-applied vagueness challenges a court must (1) determine whether the statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) consider whether the law provides explicit standards for those who apply it. United States v. Nadi, 996 F.2d 548, 550 (2d Cir. 1993).

Counts One and Two charge Hashmi with the provision of "material support or resources," including "currency" and "military gear." "Material support or resources" is defined as "property, tangible or intangible, or service, including currency and other physical assets . . ." 18 U.S.C. § 2339A(b)(1). The statute clearly gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provides explicit standards to enforce violations. See Nadi, 996 F.2d at 550. As discussed in Part I(B), "currency" and "military gear" fall within the statutory definition. In this Indictment, therefore, the term "material support or resources" is not vague. Nor is the act of "providing" it.

To support his as-applied challenge, Hashmi presents a proffer as to what the Government's allegations include based on discovery to date, namely, that the Government intends to prove that Hashmi's unlawful conduct consisted, at least in part, of allowing a confederate to transport his own luggage containing waterproof socks, ponchos, and raincoats. (Hashmi Mem. at 28-29; Tr.⁸ at 5:9-13, 14:15-18.) He argues that these materials could not "be construed as 'material' support or resources for a terrorist organization." (Hashmi Mem. at 28.) Hashmi's argument ignores the fact that Congress defined "material support or resources" within the statutory framework, and to the extent Hashmi seeks to create a de minimis exception for material that he deems without "readily apparent dangerous, nefarious, or terroristic quality," (Hashmi Mem. at 28), his argument is without merit.

The Court is similarly unpersuaded by Hashmi's contention that the term "military gear" itself is so vague that an ordinary person would not have notice that such items could be prohibited under the statute. (Hashmi Mem. at 8-11.) "Military gear," to any reasonable person of ordinary intelligence, consists of tangible property that

⁸ "Tr." refers to the transcript of the oral argument held on February 17, 2009.

can clothe and/or equip fighters. That is enough to violate the statute.

Section 2339B also provides an explicit standard for enforcement. As this Court has previously noted, “[t]he level of detail in § 2339B and its defined terms also precludes the conclusion that the Government will enforce the statute arbitrarily or discriminatorily.” United States v. Shah, 474 F. Supp. 2d 492, 500 (S.D.N.Y. 2007). Accordingly, as applied to the charges against Hashmi, § 2339B is not unconstitutionally vague.⁹

b. On Its Face

In analyzing a facial vagueness challenge, courts generally uphold a statute unless it is “impermissibly vague in all of its applications.” Hoffman Estates, 455 U.S. at 495. If the statute implicates constitutional rights, as Hashmi claims is the case here, a court must determine whether the challenged statute “reaches a substantial amount of constitutionally protected conduct.” Kolender, 461 U.S. at 358 n.8 (citations omitted).

Hashmi has not shown that § 2339B reaches a substantial amount of constitutionally protected conduct,

⁹ The Court notes that Hashmi does not argue that the term “currency” is vague.

if any.¹⁰ Hashmi proposes a hypothetical whereby "providing infant formula to refugees somehow affiliated with an FTO would result in potentially decades of imprisonment."

(Hashmi Mem. at 29.) Section 2339B prohibits the provision of material support or resources to an FTO; "refugees," in this hypothetical, are not an "organization," and Hashmi does not postulate any connection between these refugees and an FTO. Even so, providing infant formula would not be constitutionally protected if, say, it were supplied to a terrorist group that distributed the formula in order to gain popular appeal; this would free up resources the group could then use in more violent expenditures. On the other hand, assuming without deciding that providing infant formula to refugees were found to be constitutionally protected conduct, this hardly establishes that the law reaches a substantial amount of such conduct. In any event, this hypothetical cannot establish that the law reaches a substantial amount of constitutionally protected conduct. Section 2339B is thus not facially vague.¹¹

¹⁰ Other courts to consider a facial challenge to § 2339B have also rejected it. See, e.g., Warsame, 537 F.Supp. 2d at 1020; United States v. Marzook, 383 F. Supp. 2d 1056, 1066 (N.D. Ill. 2005); United States v. Taleb-Jedi, 566 F. Supp. 2d 157, 183-84 (E.D.N.Y. 2008).

¹¹ Any residual vagueness as to the scope of § 2339B was (continued on next page)

3. First Amendment

a. Free association

Hashmi next contends that § 2339B violates his First Amendment rights by making "blanket prohibitions against making financial and material contributions to legal humanitarian and political activities of designated FTOs," including the "freedom to advocate the use of force or violation of the law." (Hashmi Mem. at 19.) The First Amendment commands that "Congress shall make no law . . . abridging freedom of speech." U.S. Const. amend. I., cl. 1. This edict, along with the Amendment's protections of free exercise, assembly, and petition, implies a "right to associate for the purpose of engaging in those activities protected by the First Amendment." Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

The existence of a right to associate does not bar the enactment of laws that regulate "nonexpressive activity," such as the conduct at issue here. See Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986). In Arcara, an anti-

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further "ameliorated" by Congress's December 2004 incorporation of a specific mens rea requirement in § 2339B(a)(1). Hill v. Colorado, 530 U.S. 703, 732 (2000); see also Hoffman Estates, 455 U.S. at 499 ("[T]he Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.").

prostitution ordinance led to an action seeking closure of a bookstore that had been the scene of illegal lewdness.

Id. at 699. The New York Court of Appeals reasoned that the statute, though promulgated as a valid exercise of the state's police power, nonetheless triggered First Amendment scrutiny because of its incidental effect on the bookstore's ability to operate, and by extension to exercise its right of free expression. Id. at 701. The Supreme Court reversed and held that the legislation was aimed at unlawful conduct (prostitution) that had nothing to do with free speech or expressive conduct. Id. at 707. When "'nonspeech' conduct subject to a general regulation bears absolutely no connection to any expressive activity," the First Amendment is not implicated. Id.

Here, the crime of providing material support or resources to al Qaeda is no more "expressive" than the crime of prostitution, and Hashmi makes no attempt to explain how the conduct for which he is charged was a form of expression protected by the First Amendment.

Even assuming the provision of material support to a designated terrorist organization could implicate First Amendment rights, Congress has the power to regulate expressive conduct so long as it satisfies an "intermediate" level of constitutional scrutiny. Courts

apply intermediate scrutiny when the regulation at issue is "content-neutral," i.e., not promulgated "because of disagreement with the message it conveys" but to "[serve] purposes unrelated to the content of expression." Ward v. Rock against Racism, 491 U.S. 781, 791 (1989) (internal citations and quotations omitted).¹² The standard is set out in United States v. O'Brien, 391 U.S. 367 (1968), which held that a statute is constitutional if: (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction of alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id. at 377.

Section 2339B satisfies the O'Brien test. First, it is clearly within the federal government's constitutional

¹² Hashmi's argument that strict scrutiny is required is without merit and relies on inapposite authority concerning direct regulation of speech. Bullfrog Films, Inc. v. Wick, 847 F.2d 502 (9th Cir. 1988) (United States Information Agency content-related regulations infringed on filmmakers' First Amendment rights); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (Minnesota law against displaying a symbol that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" violated First Amendment); and Boos v. Barry, 485 U.S. 312 (1988) (D.C. law against displays near embassies was content-based restriction on political speech in a public forum). Here, however, the Court is considering a law that at most incidentally encroaches on expressive conduct.

power to regulate interactions between citizens and foreign entities. See, e.g., Teague v. Regional Comm'r of Customs, 404 F.2d 441, 445 (2d Cir. 1968) (upholding regulations "designed to limit the flow of currency to specified hostile nations" even though the regulations "impinged on First Amendment freedoms"). Second, it is beyond cavil that the government has a substantial interest in protecting citizens by choking aid to foreign terrorists. Third, this interest is designed to protect United States citizens from bodily harm rather than suppress free expression. One may cheer al Qaeda but one may not act to strengthen it with material support. Fourth, any incidental effect § 2339B may have on expression is no greater than necessary. Congress, in enacting the measure, incorporated the finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." AEDPA § 301(a)(7). As the Ninth Circuit explained, this finding means that "all material support given to [foreign terrorist] organizations aids their unlawful goals [W]hen someone makes a donation to them, there is no way to tell how the donation is used [M]oney is fungible; giving support intended to aid an organization's peaceful

activities frees up resources that can be used for terrorist acts." Humanitarian Law Project, 205 F.3d at 1136 (footnote omitted). Section 2339B, whatever its incidental effect on speech, is properly fitted to the crucial interest served.

Hashmi rightly observes that the First Amendment protects the "freedom to associate with others for the common advancement of political beliefs and ideas." Buckley v. Valeo, 424 U.S. 1, 15 (1976) (internal quotations and citations omitted). But Hashmi does not stand accused of merely espousing the beliefs of al Qaeda; he stands accused of providing the group with material support and resources. The facilitation of terrorism is not protected by the First Amendment. Section 2339B prohibits the provision of material aid to FTOs like al Qaeda, not any expression, association, or advocacy on their behalf. The District of Columbia, Seventh, and Ninth Circuits have held accordingly. See People's Mojahedin Org. of Iran v. Dept. of State, 327 F.3d 1238, 1244 (D.C. Cir. 2003) ("It is conduct and not communication that the statute controls"); Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1026 (7th Cir. 2002) ("Section 2339B prohibits only the provision of material support (as that term is defined) to a terrorist organization. There is no

constitutional right to provide weapons and explosives to terrorists, nor is there any right to provide the resources with which the terrorists can purchase weapons and explosives"); Humanitarian Law Project, 205 F.3d at 1135 (9th Cir. 2000) ("[T]he material support restriction . . . is not aimed at interfering with the expressive component of [an individual's] conduct but at stopping aid to terrorist groups").

Hashmi cites American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995), which held that "[j]oining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection." Id. at 1058. But as the Ninth Circuit has also emphasized, "advocacy is far different from making donations of material support." Humanitarian Law Project, 205 F.3d at 1134; see also Boim, 291 F.3d at 1026 ("[D]onations are not always equivalent to advocacy and are subject to greater government regulation."). Likewise, Brandenburg v. Ohio, 395 U.S. 444 (1969), cited by Hashmi, gains him no traction; that case involved advocacy of illegal action, not actual illegal action or even any material support of illegal action. Accordingly,

the Indictment may not be dismissed as a prohibited interference with Hashmi's right of free association.

b. Overbreadth Challenge

Hashmi contends that by interfering with "otherwise protected political, religious and associational activity," § 2339B violates the First Amendment's overbreadth doctrine. (Hashmi Mem. at 28-30.) A statute is overbroad if it "punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." Virginia v. Hicks, 539 U.S. 113, 118-19 (2003) (internal quotations and citations omitted). The defendant's burden in establishing overbreadth is great; the doctrine is employed by courts "with hesitation, and then only as a last resort." Los Angeles Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999) (internal citations and quotations omitted). This hesitation is greatest when analyzing laws not specifically addressed to speech or speech-related conduct, like picketing or demonstrating. Hicks, 539 U.S. at 124 (noting that in such cases, "[r]arely, if ever, will an overbreadth challenge succeed").

The analysis for Hashmi's overbreadth challenge is essentially the same as a facial challenge for vagueness. See Farrell, 449 F.3d at 499. Hashmi does not meet his

burden. His lone hypothetical about infant formula, discussed in Part I(C)(2)(b) supra, cannot serve to invalidate the entire statute. Even the most persuasive hypotheticals do not require a court to strike down a law as overbroad if they do not show that the overbreadth is substantial in relation to its legitimate reach. United States v. Assi, 414 F. Supp. 2d 707, 724 (E.D. Mi. 2006). As discussed in Part I(C)(3)(a) supra, § 2339B prohibits conduct, not "associational activity" and survives intermediate scrutiny. Even if it were shown that the law affects some activity that otherwise receives First Amendment protection, Hashmi does not show that these potential interferences are substantial in view of the law's legitimate purpose. See United States v. Hammoud, 381 F.3d 316, 330 (4th Cir. 2004) (holding that even if § 2339B encompasses some protected activity, defendant "utterly failed" to demonstrate overbreadth). Accordingly, Hashmi's motion to dismiss the Indictment on overbreadth grounds is denied.

4. Ex Post Facto Challenge

Hashmi contends that prosecution under § 2339B for conduct prior to the 2004 addition of the mens rea requirement is tantamount to enacting an ex post facto law. (Hashmi Mem. at 22-24.) The Constitution's Ex Post Facto

Clause bars Congress from passing laws to punish conduct that was legal when committed or that increase a criminal penalty after the crime has been committed. U.S. Const. art. I, § 9, cl. 3. Clarifying amendments, however, are applied retroactively and do not violate the Ex Post Facto clause. United States v. Mapp, 990 F.2d 58, 61 (2d Cir. 1993) ("When an amendment serves merely to clarify and does not enhance punishment, the Ex Post Facto Clause is not implicated"). Section 2339B was enacted in 1996. Since then it has outlawed the provision of material resources to FTOs. Indeed, the IRTPA's scienter addition served to limit, rather than expand, the scope of the criminality. Hashmi's conduct, as alleged, would always have rendered him chargeable under statute, on every count and for all times asserted. Accordingly, Hashmi's motion to dismiss the indictment on ex post facto grounds is denied.

D. The IEEPA Counts Are Constitutional

1. The IEEPA is Not An Unconstitutional Delegation

Defendant claims that the IEEPA constitutes an improper delegation of legislative authority to the President in violation of the separation of powers doctrine and Article I §§ 1, 7, and 8 of the Constitution. (Hashmi Mem. at 30-33.) The Court of Appeals, however, has already

upheld the IEEPA as a constitutional delegation of power.

United States v. Dhafir, 461 F.3d 211 (2d Cir. 2006). The Dhafir court compared the IEEPA to a portion of Controlled Substances Act, 21 U.S.C.S. § 811(h), which, as here, concerned executive designation of criminal offenses. The court found that the IEEPA “‘meaningfully constrains the [President’s] discretion,’ by requiring that ‘[t]he authorities granted to the President . . . may only be exercised with respect to which a national emergency has been declared.’” Id. at 217 (quoting Touby v. United States, 500 U.S. 160, 166 (1991), and citing 50 U.S.C. § 1701(b)). In further support of the IEEPA’s constitutionality, the Dhafir court observed that the delegated powers are “defined and limited”; that the IEEPA requires “periodic re-affirmation of necessity and is conditioned on reporting to Congress”; that the IEEPA “relates to foreign affairs—an area in which the President has greater discretion”; and that Congress has “endorsed the President’s actions and enacted legislation codifying the sanctions.” Id. at 217. Accordingly, this Court denies Hashmi’s invitation to ignore this Circuit’s law and declare the IEEPA an unconstitutional delegation.

2. The IEEPA Is Not Unconstitutionally Vague

Hashmi's final argument is that the IEEPA is unconstitutionally vague. He contends that there is no "meaningful distinction" in the language triggering its civil penalty, imposed when one "violates" the statute, and its criminal penalty, imposed when one "willfully violates" the statute. (Hashmi Mem. at 34.) As a result, he claims, due process is breached because an individual in Hashmi's position is unable to apprehend (from the term "willfully") what conduct "will be treated as a criminal transgression versus a civil infraction." (*Id.* at 34.)

The Supreme Court, in Bryan v. United States, 524 U.S. 184 (1998), discussed the use of the term "willfully" in criminal statutes and explained that

[m]ost obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. . . . As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'

Id. at 191-92 (internal citations and footnotes omitted).

The Court of Appeals has already applied this standard to the IEEPA. See United States v. Homa Int'l Trading Corp., 387 F.3d 144, 147 (2d Cir. 2004). Thus, the Indictment

need not allege, as Hashmi contends, that he "knew about the executive orders that he is charged with willfully violating." (Hashmi Mem. at 35). It is enough if Hashmi acted with the knowledge that his conduct was unlawful. Accordingly, the IEEPA counts are not constitutionally vague.

II. BILL OF PARTICULARS

Hashmi moves separately for a bill of particulars, claiming he is "unable to ascertain adequately from the face of the Indictment the nature of the case against him in order to prepare his defense and avoid surprise at trial." (Hashmi Motion for a Bill of Particulars, filed January 8, 2009.) A bill of particulars "should be required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused." United States v. Chen, 378 F.3d 151, 163 (2d Cir. 2008) (citation and quotation omitted). For the same reasons that the vagueness challenge is denied, the Court finds that the allegations of providing material support or resources—specifically, "currency" and "military gear"—are sufficient to apprise Hashmi of the specific acts of which he is accused.

In addition, Hashmi ignores the clear rule that a defendant's notice of the specific acts for which he was charged must be evaluated in light of all the information he has received from the Government.¹³ See, e.g., United States v. Barnes, 158 F.3ed 662, 665-66 (2d Cir. 1997). Hashmi's counsel acknowledged at oral argument that he was aware that "military gear" comprised raincoats, ponchos, and waterproof socks based on the discovery to date. (See Tr. at 5.) Moreover, the Government asserts, and Hashmi does not deny, that it has provided additional discovery in the form of "photographs and other information related to Hashmi's residence where the military gear was allegedly stored, telephone records, and bank records." The additional information provided by the Government obviates any argument that the Government has not provided information sufficient to advise Hashmi of the specific acts of which he is accused. Accordingly, the motion for a bill of particulars is denied.

¹³ As the Government notes in its opposition, Hashmi's motion for a bill of particulars is also procedurally deficient because it fails to comply with Local Rule 16.1, which requires an affidavit certifying that counsel for the parties have conferred in an effort to resolve by agreement the issues raised by the motion. See L.R. 16.1.

CONCLUSION

For the reasons set out above, Hashmi's motion to dismiss the Indictment (dkt. no. 62) is DENIED. Hashmi's motion for a Bill of Particulars (dkt. no. 65) is DENIED.

SO ORDERED.

Dated: New York, New York
November 17, 2009


LORETTA A. PRESKA,
CHIEF U.S.D.J.